

June, 2016

Sex, Videos, and Insurance: How Gawker Could Have Avoided Financial Responsibility for the \$140 Million Hulk Hogan Sex Tape Verdict

Christopher French

SEX, VIDEOS, AND INSURANCE: HOW GAWKER COULD HAVE AVOIDED FINANCIAL RESPONSIBILITY FOR THE \$140 MILLION HULK HOGAN SEX TAPE VERDICT

BY: CHRISTOPHER C. FRENCH*

INTRODUCTION

On March 18, 2016, and March 22, 2016, a jury awarded Terry Bollea (a.k.a Hulk Hogan) a total of \$140 million in compensatory and punitive damages against Gawker Media for posting less than two minutes of a video of Hulk Hogan having sex with his best friend's wife.¹ The award was based upon a finding that Gawker intentionally had invaded Hulk Hogan's privacy by posting the video online.²

The case has been receiving extensive media coverage because it is a tawdry tale involving a celebrity, betrayal, adultery, sex, and the First Amendment. The story would be better if all of the characters in the story were not, at best, anti-heroes. Hulk Hogan had sex with his best friend's wife. Hulk Hogan's sex partner committed adultery. Hulk Hogan's best friend, the cuckold, allegedly was the person who videotaped the encounter and then leaked it to Gawker.³ And, after sleeping with his best friend's wife, Hulk Hogan had the audacity to sue the cuckold for allegedly leaking the sex tape to Gawker, with the cuckold settling that claim by paying Hulk

* Christopher C. French is a Visiting Assistant Professor at Penn State Law School; J.D., Harvard Law School; B.A., Columbia University

1. Steven Perlberg, *\$25 Million More for Hulk*, WALL ST. J., March 22, 2016, <http://www.wsj.com/articles/hulk-hogan-awarded-additional-25-million-in-gawker-case-1458598102>.

See Fabio Bertoni, *The Stakes in Hulk Hogan's Gawker Lawsuit*, NEW YORKER, March 23, 2016, <http://www.newyorker.com/culture/cultural-comment/the-stakes-in-hulk-hogans-gawker-lawsuit>.

2. Perlberg, *supra* note 1.

3. *See id.*

Hogan \$5000.⁴ The cuckold then asserted his Fifth Amendment right against self-incrimination to avoid testifying in the case against Gawker.⁵ On the other side of the story, Gawker, the entity that posted the sex tape online, is a “media gossip” website host and does not look very good attempting to wear the cloak of the First Amendment by claiming that the contents of the Hulk Hogan sex video, as opposed to the simple fact that the tape existed, was newsworthy.⁶ Nor did it help Gawker’s image when Gawker’s editor testified that he would only draw the line against posting sex videos if the video included a child under four years old.⁷ It is hard to root for any of the parties in the case.

The case likely will be remembered by most people for: 1) the shockingly high verdict amount of \$140 million awarded to a celebrity adulterer who was filmed having sex with his best friend’s wife, and 2) the battle between what constitutes the outer boundaries of what is considered “news” under the First Amendment and a celebrity’s right to privacy. The case also should be remembered, however, for the lesson it provides business owners: instead of facing a damage award that forced Gawker to file for bankruptcy⁸ and to now seek relief on appeal, Gawker actually could have avoided paying any portion of the damage award. How could Gawker have obtained that result? Insurance.

The conventional wisdom is that insurance does not cover intentional torts such as invasion of privacy and that it is against public policy to allow insurance to cover such intentional torts.⁹ Conventional wisdom also dictates that it is against public policy to allow insurance to cover punitive damage awards. This Article explains why those tropes of conventional wisdom are wrong in many states and how Gawker may have been able to avoid paying any portion of the ultimate damage award if it had purchased appropriate insurance coverage.

4. *Id.*

5. *Id.*

6. *Id.* See also Jonathan Mahler, *Gawker’s Moment of Truth*, N.Y. TIMES, June 12, 2015, <http://nyti.ms/1SbecAf>.

7. See Bertoni, *supra* note 1.

8. See Lukas I. Alpert, *Gawker Files for Bankruptcy, Will Be Put Up for Auction*, WALL ST. J., June 10, 2016, <http://www.wsj.com/articles/gawker-declaring-bankruptcy-will-be-put-up-for-auction-1465578030>.

9. See Christopher C. French, *Debunking the Myth that Insurance Coverage is Not Available or Allowed for Intentional Torts or Damages*, 8 HASTINGS BUS. L.J. 65, 66–67 (2012).

I. COMMERCIAL GENERAL LIABILITY INSURANCE FOR INVASION OF PRIVACY CLAIMS

Under the Personal and Advertising Liability coverage provisions of standard form Commercial General Liability (CGL) policies, numerous types of intentional torts, including claims for invasion of privacy, are covered.¹⁰ Specifically, under such policies, the insurer agrees to “pay those sums that the insured becomes legally obligated to pay as damages”¹¹ because of “oral or written publication, in any manner, of material that violates a person’s right of privacy.”¹²

Most companies in America, including Gawker, have CGL coverage.¹³ Large companies routinely have hundreds of millions of dollars of CGL coverage, which, of course, would be enough to cover a \$140 million award, assuming a court enforces the terms of the coverage.¹⁴

II. PUBLIC POLICY ARGUMENTS AGAINST ALLOWING INSURANCE TO COVER INVASION OF PRIVACY CLAIMS AND PUNITIVE DAMAGE AWARDS

Even though an entity has purchased insurance that covers intentional torts such as invasion of privacy, the question of whether public policy should allow insurance to cover such claims still has to be answered affirmatively by a court before the insured entity can actually recover insurance proceeds for such claims. Unquestionably, intentional torts such as invasion of privacy should be discouraged and deterred. Allowing insurance to cover intentional torts such as invasion of privacy would undermine such goals.¹⁵ If an entity will not suffer any financial consequences for violating another person’s privacy, then there is little to deter such violations.

Similarly, punitive damages are awarded to advance the twin goals of

10. *Id.* at 67–69.

11. Commercial General Liability Coverage Form CG 00 01 12 07, reprinted in DONALD S. MALECKI, COMMERCIAL GENERAL LIABILITY 469, 471 (2012).

12. *Id.* at 479.

13. See, e.g., Christopher C. French, *Segmented Settlements Are Not the Answer: A Response to Professor Squire’s Article*, How Collective Settlements Camouflage the Costs of Shareholder Lawsuits, 7 VA. L. & BUS. REV. 589, 611 (2013) (discussing CGL coverage generally); Complaint for Declaratory Judgment at ¶ 19, *Nautilus Ins. Co. v. Gawker Media, LLC*, No. 14 CV 5680 (S.D.N.Y. Dec. 28, 2012) (discussing Gawker’s CGL coverage).

14. See French, *supra* note 13, at 612.

15. See, e.g., H. Karen Cutler, *Liability Insurance for Intentional Torts—Subrogation of the Insurer to the Victim’s Rights Against the Insured*: *Ambassador Insurance Co. v. Montes*, 32 RUTGERS L. REV. 155, 157 (1979).

deterrence and punishment for egregious misconduct.¹⁶ Again, such goals would be undermined if insurance were allowed to cover punitive damage awards because the wrongdoer would be financially absolved from the consequences of its egregious misconduct.¹⁷

III. PUBLIC POLICY ARGUMENTS IN FAVOR OF ALLOWING INSURANCE TO COVER INVASION OF PRIVACY CLAIMS AND PUNITIVE DAMAGE AWARDS

Yet, there also are sound public policies that support allowing insurance to cover intentional torts. One, victims should be compensated for their injuries. In many circumstances, the tortfeasor's insurance is the only significant source of compensation for injured parties because most people are judgment-proof for significant judgment amounts.¹⁸ Two, the terms of contracts, such as insurance policies, should be enforced.¹⁹ Insurers should not be allowed to collect premiums to cover intentional torts only to have courts refuse to enforce such policies, which would result in windfall premiums being paid to insurers in exchange for providing only illusory insurance coverage.

IV. RECONCILIATION OF THE COMPETING PUBLIC POLICIES BY COURTS

Numerous courts across the country have been asked to decide whether insurance coverage does and should be allowed to cover intentional torts such as invasion of privacy, and many of them have

16. See, e.g., *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 16–17 (Tex. 1994).

17. See, e.g., *Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 434 nn. 1, 5 (5th Cir. 1962) (discussing whether punitive damages should be allowed to be covered by insurance based on the theory that such coverage would thwart the dual purpose of punitive damage awards to punish and deter); *U.S. Concrete Pipe Co. v. Bould*, 437 So. 2d 1061, 1064 (Fla. 1983) (“The Florida policy of allowing punitive damages to punish and deter those guilty of aggravated misconduct would be frustrated if such damages were covered by liability insurance.”).

18. See, e.g., Stephen G. Giles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 605–07 (2006) (discussing the reasons why judgments against most people are uncollectible); Kyle D. Logue, *Solving the Judgment-Proof Problem*, 72 TEX. L. REV. 1375, 1375–76 (1994) (discussing the impact insurance has on the judgment-proof problem); Steven Shavell, *The Judgment Proof Problem*, 6 INT'L REV. L. & ECON. 45, 45–46 (1986) (analyzing the problems that result from judgment-proof individuals).

19. See, e.g., *McNulty*, 307 F.2d at 444 (Gewin, J., concurring) (stating that public policy favors the enforcement of contracts); *Sch. Dist. for Royal Oak v. Cont'l Cas. Co.*, 912 F.2d 844, 849 (6th Cir. 1990) (“Public policy normally favors enforcement of insurance contracts according to their terms.”).

concluded that they do and should.²⁰ Similarly, although some jurisdictions do not allow insurance to cover punitive damage awards, the majority rule in America is that CGL policies can and do cover punitive damage awards.²¹ The reason for this is that such policies typically cover all “damages” for which the policyholder is liable without distinguishing between compensatory damages and punitive damages.²²

With respect to the public policy concerns that allowing insurance to cover punitive damages would reduce the deterrent and punishing effects of punitive damage awards, the Wyoming Supreme Court’s reasoning on the issue is emblematic of the courts that have rejected such arguments:

We know of no studies, statistics or proofs which indicate that contracts of insurance to protect against liability for punitive damages have a tendency to make willful or wanton misconduct more probable, nor do we know of any substantial relationship between the insurance coverage and such misconduct.²³

In short, in many states in which the courts have considered these issues, the courts have allowed insurance to cover both intentional torts and punitive damages.

V. INSURANCE FOR *HULK HOGAN V. GAWKER MEDIA*

So, does Gawker have liability insurance to cover the \$140 million Hulk Hogan verdict? Reportedly, it does not.²⁴ Not only did a jury conclude that Gawker made a poor decision when it chose to publish a portion of the Hulk Hogan sex tape, but Gawker also apparently only

20. See, e.g., *Universal Underwriters Ins. Co. v. Lou Fusz Auto. Network, Inc.*, 401 F.3d 876, 883 (8th Cir. 2005); *Lineberry v. State Farm Fire & Cas. Co.*, 885 F. Supp. 1095, 1099 (M.D. Tenn. 1995); *Purrelli v. State Farm Fire & Cas. Co.*, 698 So.2d 618, 621 (Fla. Dist. Ct. App. 1997); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1376, 1384–85 (Md. 1997); *U.S. Fire Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 511 N.E.2d 127, 129 (Ohio Ct. App. 1986).

21. See PETER J. KALIS ET AL., *POLICYHOLDER’S GUIDE TO THE LAW OF INSURANCE COVERAGE* § 5.04 (1st ed. 1997).

22. Standard form commercial general liability policies state that the insurer agrees to pay “all sums” the policyholder is “legally obligated to pay as damages” without limiting the covered damages to only compensatory damages. Commercial General Liability Coverage Form, *supra* note 11. See also Tom Baker, *Reconsidering Insurance for Punitive Damages*, 1998 WIS. L. REV. 101, 115 (1998) (“The agreements do not distinguish among kinds of damages Indeed, there is little dispute that, on their face, most primary general and automobile policies provide coverage for punitive damages.”).

23. *Sinclair Oil Co. v. Columbia Cas. Co.*, 682 P.2d 975, 981 (Wyo. 1984). See also *Skyline Harvestore Sys., Inc. v. Centennial Ins. Co.*, 331 N.W.2d 106, 109 (Iowa 1983) (“[W]e doubt that ordinary potential tortfeasors make calculations to determine if the expected benefits of a harmful act are outweighed by the potential costs of punitive damages, insured or uninsured.”).

24. See Mahler, *supra* note 6.

purchased \$1 million in CGL insurance,²⁵ which is a surprisingly low amount for a business that annually generates approximately \$45 million in advertising revenue and is regularly sued.²⁶ By the time the trial started, its insurance coverage already had been exhausted on defense costs.²⁷ Consequently, although Gawker could have shielded itself from liability for the jury verdict by purchasing a significant amount of insurance as most major companies in America do, Gawker apparently did not. As a result, Hulk Hogan, was not the only party in the case that, in insurance parlance, was naked.

CONCLUSION

Although the *Hulk Hogan v. Gawker Media* case likely will be remembered as a tawdry sex scandal that highlighted the clash between the outer boundaries of First Amendment rights and a celebrity's right to privacy, it also is a great illustration of two counterintuitive and often overlooked aspects of insurance law: 1) insurance is readily available to cover intentional torts such as invasion of privacy, and 2) public policy arguments against allowing insurance coverage for many intentional torts and for punitive damage awards have been rejected by courts in many states. When weighing the competing public policies, many courts have concluded that the public policies in favor of enforcing insurance contracts and compensating victims outweigh the public policies of punishing and deterring wrongdoers. So, putting aside the questionable wisdom or legality of posting a celebrity sex video online, if Gawker simply had purchased adequate insurance, then it might have avoided bankruptcy and financial responsibility for the \$140 million dollar Hulk Hogan sex tape verdict regardless of what the appellate court decides regarding the appropriateness of the award.

25. See Complaint for Declaratory Judgment at ¶ 19, *Nautilus Ins. Co. v. Gawker Media, LLC*, No. 14 CV 5680 (S.D.N.Y. Dec. 28, 2012). CGL policies typically contain an exclusion for Personal and Advertising liability coverage (the section of CGL policies that provides coverage for invasion of privacy claims) for media companies. See Commercial General Liability Coverage Form, *supra* note 11, at 471. In such circumstances, media companies can purchase professional liability insurance to cover such claims. See, e.g., ACE Advantage Multimedia Liability Policy (2007) (on file with author).

26. See Mahler, *supra* note 6.

27. See Mahler, *supra* note 6.